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Methods of Norm Conflict Avoidance in International Law Applied to the Relationship Between Human Rights Law and Humanitarian Law: Fragmentation or Harmonisation?

The Applicability of Human Rights Treaties in the Context of Armed Conflicts.

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1 INTRODUCTION

1.1 Introduction to Human Rights Law and Humanitarian Law

Human rights treaties are defined by their subject matter as those treaties that have the object of safeguarding those rights of individuals, which are somehow perceived as being inherent in their human dignity. They only impose obligations on their State Parties, and do not do so for third states. They create obligations between States vis-à-vis individuals. Through judicial bodies governing the observance of the human rights treaties, these individuals have effective resources to obtain remedies for violations of their rights. Their potential subject matters range from the right to life and liberty, to social, economic, and cultural rights, and the right to a sustainable environment.

International human rights law (IHRL) witnessed its expansion in the second half of the twentieth century as the result of two devastating World Wars. In 1948, the General Assembly adopted the Universal Declaration of Human Rights. Subsequent important conventions include the International Covenant on Economic, Social, and Cultural Rights (ICESCR)¹, the International Covenant on Civil and Political Rights (ICCPR)², and the Optional Protocol³ to the latter, all adopted in 1966. Substantial regional conventions include: the European Convention on Human Rights (ECHR) of 1950, the American Convention on Human Rights (ACHR) of 1969, the African Charter of Human and Peoples' Rights of 1981, and the Arab Charter on Human Rights of 2004.

International humanitarian law (IHL) is the laws applicable in times of war and armed conflict, also referred to as *jus in bello*. IHL originated at a time when the concept of (contemporary) human rights did not yet exist, and can be traced back at least to the 19th century when Henri Dunant began his action in favour of victims of war. IHL is a set of international rules, which are specifically intended to solve humanitarian problems directly arising from international or non-international armed conflicts. Humanitarian law aims at placing restraints on the conduct of warfare so as to diminish its effects on the victims of the hostilities, whilst the use of deadly warfare is still a lawful measure to be taken into account. IHL experienced

¹ Hereinafter ICESCR, 1966, 161 parties to date

² Hereinafter ICCPR, 1966, 167 parties to date

³ 115 parties to date

its most comprehensive codification and developments in 1949 with the adoption of the four Geneva Conventions and their additional protocols, each addressing the protection of specific categories of persons in situations of armed conflict. However, already in 1907, the Hague Regulations codified the law and customs of war on land. These treaty documents have been recognized as expressing customary international law.⁴

Even though both IHL and IHRL developed in the same era and are broadly similar legal regimes, the two were based on very different premises. Unlike human rights law, the protection afforded to individuals under humanitarian law was not an end in itself but rather primarily concerned with addressing the reciprocal rights of States. Accordingly, IHL obligations are not of an intra-State character but rather of an inter-State character. In contrast, IHRL binds all States *vis-à-vis* all those within their jurisdiction, and traditionally not applying to the relationship between a State and the nationals of an enemy belligerent State. Under IHRL all individuals enjoy a protection by the mere fact that they are ‘individuals’. Under IHL, however, there is an explicit distinction between ‘civilians’ and “combatants” which sits at its root. In IHL civilians are those that “do not take part or who have ceased to take part in hostilities”, while combatants “have the right to participate directly in hostilities”.⁵

Therefore, at first glance, the law of armed conflict and human rights law seem like a poor match. European participation in the armed conflicts in Iraq, Afghanistan, Syria and Libya, has forced us to ask the question whether signatory States to human rights treaties are obliged to protect the rights and freedoms of the Convention *vis-à-vis* individuals of non-State parties to the Convention.

1.2 Object and Purpose of the Study

This thesis sets out to examine the relationship between international human rights law and international humanitarian law, and the application of particular human rights in the context of armed conflicts. IHL is by its very nature in force whenever and wherever a state of *de facto* armed conflict is declared, whilst obligations under IHRL are considered not applicable in wartime and not outside a State’s own national territory. Thus, the preliminary question is whether human rights instruments are extraterritorially applicable outside a State’s own terri-

⁴ See the ‘International Committee of the Red Cross, Customary International Humanitarian Law: Volume 1 Rules’.

⁵ Additional Protocol II Article 4(1) and Additional Protocol I Article 43(2)

tory. The triggering of jurisdiction extraterritorially is based either on a factual connection between the State and the territory affected – a spatial connection – or between the State and the individual concerned – a personal connection.

The principle question is whether the two fields of law develop in a way of fragmenting the legal framework that protects the individual; whether their requirements conflict with each other; or whether they develop towards forming the common legal ground for the protection of individuals in the context of an armed conflict. In practice, the crucial question when assessing this interaction is whether the protection accorded to individuals under the IHRL is restricted when applied with IHL. With regards to this we will examine and compare cases from the International Court of Justice (ICJ) and the European Court of Human Rights (ECtHR).

The essence of fragmentation relates to ‘the splitting up of the law into highly specialized “boxes” that claim relative autonomy from each other’.⁶ Fragmentation can take place through the conflicting interpretation of general law, the emergence of special law diverging from the general law, or the existence of two different bodies of special law.⁷ Thus, a related problem is that of normative conflict between the rules that relate to the same subject matter, yet require different outcomes in relation to it, for instance by virtue of one of them being *lex specialis*.⁸

An analyse of the extensive case law from this field, will allow us to understand the developments that have occurred and how international jurisdiction understand the relationship between IHL and IHRL. When examining specific human rights in the context of armed conflicts the judicial bodies are confronted with situations of potential norm conflict. Our analyse will show how the European and American system of human rights protection approach IHL and how they interpret the applicable human rights treaties in light of IHL. Such an examination will show us whether they act harmoniously, whether they help fill in the gaps of each other, or whether one field of law has priority over the other.

⁶ Report of the Study Group of the International Law Commission, ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’, pp. 13-14, (hereinafter ILC Fragmentation Report).

⁷ Ibid p. 31-34

⁸ *Lex specialis*. The principle that a particular law that may displace a more general law in the event of a conflict between the two. See ‘Brownlie’s Principles of Public International Law’ (hereinafter Brownlie’s) (Oxford University Press, Eighth Edition), James Crawford, Glossary (lxxix), and Section 2.5 in this paper.

In chapter 2 we recapture the most relevant interpretational methods in international law, which can be applied so as to avoid a potential norm conflict. The following case law will be examined on this background. Chapter 3 will examine the relationship between IHRL and IHL. In section 3.2 we examine the geographical scope of human rights treaties. Section 3.3 looks at the jurisprudence from the ICJ, and in section 3.4 we turn our attention to some specific human rights norms which have to be interpreted in the context of IHL. The subject matters that are chosen to be analysed in this paper, are rules of IHRL whom are in potential norm conflict with standards of IHL. We will explore the possibility that human rights bodies reach beyond the treaties that establish them and draw upon the principles of the law of armed conflict. The concluding chapter will sum up the findings from the extensive case law examination that have been conducted and hopefully give a better theoretical and practical understanding of the relationship between IHL and IHRL.

2 METHODS OF NORM CONFLICT AVOIDANCE IN INTERNATIONAL LAW

2.1 Introduction

The notion conflict exists between two norms “if one norm constitutes, has led to, or may lead to, a breach of the other.”⁹ What makes this such a crucial problem in international law rather than domestic law, is the fact that the former lacks the key method for resolving a genuine norm conflict, which is a centralized system with a developed hierarchy and that hierarchy being based on the sources of norms.¹⁰ Thus, in domestic systems a constitutional norm will prevail over a statutory one, while legislation will ordinarily prevail over executive orders or decrees. In international law, on the other hand, all sources of law are generally considered equal. Therefore, in international law, the methods to solve potential norm conflicts become a crucial issue, and form a part of the larger phenomenon of fragmentation of international law. The concept of fragmentation relates to “the splitting up of the law into highly specialized ‘boxes’ that claim relative autonomy from each other and from the general law”.¹¹ Fragmenta-

⁹ Joost Pauwelyn, ‘Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International law’, pp. 175-176

¹⁰ Marko Milanovic, ‘Norm Conflict in International Law: Whiter Human Rights?’, p. 74

¹¹ ILC Fragmentation Report, p. 13

tion can take place through the conflicting interpretation of general law, the emergence of special law diverging from general law, or the existence of two different bodies of special law.¹²

This relates to the relationship between IHRL and IHL. IHRL has found its way into the realm of IHL, and has thus brought with it potentially conflicting standards of rules. When applying human rights law in the context of armed conflicts where IHL is traditionally understood as the exclusive applicable regime, judicial human rights bodies are confronted with norms with different standards of protection. Human rights treaties themselves contain very few mechanisms to solve such a conflict, and those that do exist have rarely been used.¹³ This chapter will introduce some of the tools available to solve a case of potential norm conflict in the area between IHRL and IHL.

2.2 UN Charter Article 103

Article 103 of the United Nations Charter¹⁴ reads as follows:

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

Article 103 does not say that the Charter itself prevails, but refers to “obligations under the Charter”. Apart from the rights and obligations contained in the Charter itself, this also covers duties based on binding decisions by the United Nations bodies. The most important case is that of Article 25 that obliges Member States to accept and carry out resolutions of the Security Council that have been adopted under Chapter VII of the Charter. If a Security Council resolution contains obligations of such an extent that it would violate the State’s other obligations under IHRL, the solution would have had to be that the obligation under IHRL would be set aside to the extent that it conflicted with obligations pursuant to Article 103.¹⁵ The obliga-

¹² ILC Fragmentation Report, pp. 31-35

¹³ This refers to the articles allowing a State party to derogate lawfully of some of its duties under the human rights conventions. For more see section 2.3.

¹⁴ Hereinafter UN Charter

¹⁵ ILC Fragmentation Report §333

tions under article 103 would “prevail”, but not invalidate the conflicting treaty norm. The State is merely prohibited from fulfilling an obligation arising under that other norm.¹⁶ Later we will see how the ECHR resolve a potential norm conflict arising between Article 5 of the Convention and a Security Council Resolution.

2.3 Derogation Clauses in Human Rights Treaties

Derogation clauses in human rights treaties have some of the same functions as Article 103 of the UN Charter. The only difference being that Article 103 will apply in general to potential norm conflicts, while derogations clauses can only solve a conflict if the state of emergency meets the requirements *before* an actual norm conflict rises. If the norm that is in conflict has not been lawfully derogated, the derogation clause will not solve the situation. The norm is still fully functioning.

Such derogation clauses are found in: Article 4 of ICCPR¹⁷, Article 15 of ECHR and Article 27 of ACHR. They allow a State party unilaterally to derogate temporarily from a part of its obligations under the respective conventions. In essence, to invoke derogation, two fundamental conditions must be met: (i) the situation must amount to a public emergency which threatens the life of the nation, and (ii) the state party must have officially proclaimed a state of emergency.¹⁸ The latter requirement is essential for the maintenance of the principle of legality and the rule of law when they are most needed.¹⁹ Examples of emergency situations include, but are not limited to, armed conflicts, civil and violent unrest, environmental and natural disasters, etc. According to HRC “[n]ot every disturbance or catastrophe qualifies as a public emergency which threatens the life of the nation”.²⁰ An armed conflict, therefore, does not automatically satisfy the criteria of “public emergency” as there is also a qualitative measure of severity that demands derogations to be permissible only to the “extent strictly required by the exigencies of the situation”.²¹ This condition reflects upon the principle of

¹⁶ Ibid §334

¹⁷ See Commission on Human Rights, Report E/CN.4/1999/92

¹⁸ See Human Rights Committee (hereinafter HRC), General Comment No. 29 §2

¹⁹ Ibid.

²⁰ Ibid. §3

²¹ ICCPR Article 4(1)

proportionality, and relates to the duration, geographical coverage and material scope of the state of emergency.²²

Furthermore, measures derogating from provisions of the conventions must not be inconsistent with the state's "other obligations under international law"²³. For example, while derogations from a human rights treaty are possible, it is not possible to derogate from IHL, because humanitarian law applies precisely to those situations that are amongst those justifying the emergency derogation from human rights treaties. If an armed conflict occurs, the State will need to consider whether the situation is one that amounts to an emergency "threatening the life of the nation". As we will see, in many of the cases arising in the context of armed conflict, the ECHR emphasise that unless the State has derogated lawfully under Article 15, it still remains in duty to oblige by the Conventional standards regardless of the situation on the ground. Therefore, in essence, derogation clauses aim at striking a balance between the protection of individual human rights and the protection of national needs in times of crisis. Whether a State refrains from derogation due to the fear of the situation not meeting the strict threshold of exigencies needed to be conducted, or due to possible negative reactions from the international communities, is hard to tell. Nevertheless, the ECHR has given States the opportunity to lawfully derogate from their obligations under the Convention. Whether it meets the requirements or not is another issue. If this tool is not used, it must face the scrutiny of the supervising Court.

2.4 VCLT Article 31(3)(c)

Article 31(3)(c) of Vienna Convention on the Law of Treaties (VCLT) provides that:

There shall be taken into account, together with the context: ... (c) any relevant rules of international law applicable in the relations between the parties.

This Article is understood as the principle of "systematic integration" whereby an international treaty is interpreted by reference to its normative environment.²⁴ This Article does not solve a direct norm conflict, it is rather meant to help the interpreter in his legal reasoning to

²² HRC General Comment no. 29, §4

²³ ECHR Article 15(1), ICCPR Article 4(1)

²⁴ ILC Fragmentation Report §413

generate comparative law analogies in the development of judicial processes.²⁵ This method of interpretation emphasises that the normative environment of a treaty cannot be ignored and thus, when interpreting the treaty, relevant rules of general international law should be borne in mind. The rules of international law applicable are rules of customary law, general law or other treaty based on international law. On the other hand, the normative weight a general rule carries, has to be argued on a case-by-case basis. In many of the cases analysed below we see that the courts make extensive use of rules and principles found in general international law when interpreting, but rarely refer to Article 31(3)(c) as the guiding tool. Nevertheless, the implicit use of this interpretation method allows Courts to find support in either direction when solving a norm conflict.

2.5 The Principle of *Lex Specialis*

The principle that special law derogates from general law is a widely accepted maxim of legal interpretation for the resolution of normative conflicts.²⁶ As a principle, *lex specialis* can be understood in two different ways: First, the special rule may be considered an interpretation of a general rule in a given circumstance, as such, it becomes a rule for norm conflict *avoidance*. The special rule should be read and understood within the confines or against the background of the standards of the general rule.²⁷ Neither one overrides the other. The standard of the special rule are used as an interpretational tool when applied to the general. When observed in this manner, it may not even give rise to a norm conflict in the stricter sense, because it can be seen as the simultaneous application of both. Secondly, *lex specialis* can be considered as a norm of conflict *resolution*, in the sense that the special rule can modify or set aside the general rule if the two rules are irreconcilable. Understood in this sense, the special rule is characterised as the prevailing norm, accordingly, if the standards found in the general rule are in conflict with the standards found in the special rule, the latter one prevails. The courts are thus left with the choice to either apply the special rule, disregarding the general rule, or declare a situation of direct norm conflict and decide on which set of norms it will apply to the specific case.

The first apparent problem is that, to invoke the *lex specialis* approach one must deter-

²⁵ Brownlie's p.35

²⁶ ILC Fragmentation Report §56

²⁷ ILC Fragmentation Report §56

mine *de facto* which rule is *lex specialis* and which is *lex generalis*. Used in the national legal order which consists of hierarchy and systematic relations, its applicability comes as a natural consequence of this system. Used on the fragmented legal system that is the international law, its applicability cannot be easily foreseen, because it does not provide any criteria for the determination of whether one area of law is generally more important or special than the other. Nevertheless, the acceptance of the concept by international law has much to do with its ability to take into account particular circumstances, and as a result be more effective than the general rule when applied in a specific context. What has been suggested is that the special nature of the facts in a specific case justifies a deviation from what otherwise would be the “normal” course of action.²⁸

2.6 Peremptory *Jus Cogens* Norms

In international law it has been accepted that there is a category of norms that are so fundamental that derogation from them can never be allowed.²⁹ It has been positively expressed in VCLT Article 53:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

A peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole. If a new peremptory norm of general international law emerges, any existing treaty that conflicts with that norm is terminated.³⁰ As such, the effect of one rule being a *jus cogens* norm is that it simply invalidates the conflicting norm. The conflicting norm becomes void and null, giving rise to no legal consequences.³¹ Thus, it is a norm of hierarchal character, and not just a rule of precedence such as Article 103

²⁸ ILC Fragmentation Report §105

²⁹ ILC Fragmentation Report §361 and HRC General Comment No. 24 §8.

³⁰ VCLT Article 64

³¹ VCLT Article 71

of the UN Charter.³² The nature and effects of *jus cogens* were summarized by the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Furundzija* judgment:

“Because of the importance of the values it [the prohibition of torture] protects, this principle has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even “ordinary” customary rules. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by States through international treaties or local or special customs or even general customary rules not endowed with the same normative force.”³³

The most significant use of *jus cogens* as a conflict norm has been by the British House of Lords in the *Pinochet* case.³⁴ Here, the question arose whether immunity of a former Head of State could be upheld against an accusation of having committed torture while in office. Referring to relevant passages in the *Furundzija*, the Lords held that “the *jus cogens* nature of the international crime of torture justifies states in taking universal jurisdiction over torture wherever committed”. The Pinochet litigation turned out to have historic consequences in the sense that for the first time a local domestic court denied immunity to a former Head of State on the grounds that there cannot be any immunity against a breach of *jus cogens*.³⁵

Identifying *jus cogens* has to be done by reference to what is “accepted and recognized by the international community of States as a whole”.³⁶ Examples of *jus cogens* are: the prohibition of use of force, piracy, slavery and slave trade, genocide, racial discrimination and apartheid, torture, crimes against humanity, basic rules of international humanitarian law applicable in armed conflict (the prohibition of hostilities directed at the civilian population), the right to self-defence and self-determination.³⁷ Some of these are more controversial than oth-

³² ILC Fragmentation Report §365

³³ *Prosecutor v. Anto Furundzija*, Judgment of 10 December 1998, Case No. IT-95-17/1, Trial Chamber II, §153. See ILC Fragmentation Report §370

³⁴ *Regina v. Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte*, (No. 3), 24 March 1999, House of Lords, 119 ILR, p. 136.

³⁵ ILC Fragmentation Report §371

³⁶ VCLT Article 53

³⁷ Draft Articles on Responsibility of States for International Wrongful Acts, Commentary on Article 40, §4-6, Official Records of the General Assembly, Fifth-sixth Session (A/56/10) pp. 283-284. See also *Prosecutor v. Anto Furundzija* §151-157

ers, and the real issue is that there is no agreement about the criteria for inclusion on to that list. Therefore, International Law Commission (ILC) thought it best to leave to the courts and state practice to work out the contents of *jus cogens*.³⁸

2.7 Obligations *Erga Omnes*

Obligations *erga omnes* are different from Article 103 of UN Charter and *jus cogens*. *Erga omnes* obligations designate the scope of application of the relevant law, and the procedural consequences that follow this.³⁹ It is not the norm itself which is characterized as *erga omnes*, it is the obligation it gives rise to which is capable of being an *erga omnes* obligation. Normally, reciprocal obligations between States arise by virtue of binding treaties of bilateral character, limited only by the sovereign itself. State responsibility can thus only be invoked by the party to whom an international obligation is owed.⁴⁰ Nevertheless, contemporary international law has accepted the creation of obligations of a more independent character, which cannot be meaningfully reduced into reciprocal State-to-State obligations.⁴¹ One famous case to articulate this was the ICJ Advisory Opinion in the *Reservation to the Genocide Convention*:

“In such a convention [the Genocide Convention] the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties.”⁴²

In another famous case, the *obiter dictum* in the *Barcelona Traction* case, the Court stated that:

³⁸ ILC Fragmentation Report §376

³⁹ ILC Fragmentation Report §380

⁴⁰ *Reparations for Injuries suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports, April 11, 1949
pp. 181-182.

⁴¹ ILC Fragmentation Report §385

⁴² *Reservations to the Convention on Genocide*, Advisory Opinion, ICJ Reports 1951, p. 15, p. 23

“[A]n essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In the view of the importance of the rights involved, all States can be held to have legal interest in their protection; they are obligations *erga omnes*.

Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination...”⁴³

Such obligations are owed to the international community as a whole, and all States have a legal concern in their protection. In theory, where there is a violation of an *erga omnes* obligation, all states become “victim of the violations”. Thus, all States are procedurally entitled to invoke state responsibility.⁴⁴ However, the obligation being *erga omnes* is not an indicator that it is of higher rank than other obligations, like *jus cogens*, or that it shall prevail like Article 103. For example, if a State tortures its own citizens, no other State suffers any direct harm. Nevertheless, the acceptance by the international community as a whole, that the prohibition of torture is the concern of all States, gives rise to a legal interest in their prosecution.⁴⁵ In *Barcelona Traction*, the Court gave examples of such obligations also having the character of *jus cogens*. However, these obligations must not be confused of being the same. *Jus cogens* norms might give rise to obligations *erga omnes*, but not visa-versa.⁴⁶ Accordingly, it is not the source of the norm, a human rights treaty or multilateral treaty, that is decisive for whether the norm gives rise to obligations *erga omnes*. It is rather the character of primary norms that determines the nature of secondary rules.⁴⁷

⁴³ *Barcelona Traction, Light and Power Company, Limited*, Judgment, ICJ Reports 1970, p. 3 (Second Phase) §33-34. Also see: Draft Articles of State Responsibility Article 48; HRC General Comment No. 31 §2: “While article 2 [of ICCPR] is couched in terms of the obligations of State Parties towards individuals as the right-holders under the Covenant, every State Party has a legal interest in the performance by every other State Party of its obligations. This follows from the fact that the ‘rules concerning the basic rights of the human person’ are *erga omnes* obligations”.

⁴⁴ Oscar Schachter, *International Law in Theory and Practice*, p. 196

⁴⁵ Draft Articles of State Responsibility Article 48(1)(b)

⁴⁶ ILC Fragmentation Report §404

⁴⁷ ILC Fragmentation Report §402

3 THE RELATIONSHIP BETWEEN IHRL AND IHL

3.1 Reconciling IHL and IHRL

In this part of the thesis, the principle question of concern in this part of the thesis is whether international humanitarian law and international human rights law develop in a way of fragmenting the legal framework that protects the individual, whether their requirements conflict with each other, or whether they develop towards forming a common legal ground for protection of individuals in the context of an armed conflict. In practical terms, the crucial issue is whether the protection provided to individuals under IHL is less than that under IHRL.

In this chapter we take on a closer look at two distinct judicial bodies and their approach to the questions arising from the interaction between IHL and IHRL, namely the International Court of Justice and the European Court of Human Rights. There are substantial differences between ICJ and ECtHR because of the nature of their legal systems. The jurisdictional competence of ICJ allows for it to consider *all* types of disputes between States that occur in *any* part of the globe concerning *any* area of international law.⁴⁸ Accordingly, if the States to the dispute recognise the Courts jurisdiction, it is entirely up to the Court how it decides to solve a case. The European Court of Human Rights, on the other hand, is a regional court that deals with cases arising from individual applications against a State party, and its jurisdictional competence is limited to interpret and apply “the Convention and the protocols thereto”.⁴⁹ Accordingly, the jurisdictional scope of the latter is much more limited than the former. Nevertheless, all international bodies that interpret principles and rules of international law can apply the interpretation techniques, which are mentioned above.

3.2 The Applicability of IHRL in Times of Armed Conflict

3.2.1 Extraterritorial Applicability of the ECHR

The ECtHR has declared that the Convention is a constitutional instrument of European public order, and that it is not meant to apply throughout the world.⁵⁰ European participation in

⁴⁸ The Statute of the International Court of Justice Chapter II, especially Article 38.

⁴⁹ ECHR Article 31, ACHR Article 62

⁵⁰ See *Loizidou v. Turkey* (Preliminary Objections) §75, *Al-Skeini and Others v. the UK* §141, *Bankovic and Others v. Belgium and Others* §80

the armed conflicts in Iraq, Afghanistan, Syria and Libya, however, have forced us to question whether signatory States are obliged to protect the rights and freedoms of the Convention vis-à-vis individuals of non-State parties to the Convention. This concerns the Convention's extraterritorial scope, and the question is whether the Convention extends to actions taken by signatory States in foreign territories, where several of them are occupying territory, administering detention facilities, and conducting more limited military security operations.

The question is therefore whether or not the meaning of Article 1 of the ECHR "within their jurisdiction" is limited to a territorial notion of jurisdiction found in general international law, or if it is understood broader. If so, this would entail that the actions of signatory States violating Convention norms will fall within the scope of ECHR, and accordingly entail state responsibility for its breach.

Opponents to the extraterritorial application of human rights treaties often claim that the concept of 'jurisdiction' in human rights treaties is equivalent to the concept of 'jurisdiction' found in general international law. In general international law, jurisdiction is an aspect of state sovereignty, and refers to the power to regulate the conduct of natural and juridical persons within its territory through legislative, executive and judicial powers.⁵¹ The problem with this approach, as many scholars have emphasized, is that it tends to deny jurisdiction in human rights law terms if a state only exercises *de facto* authority abroad, but not *de jure*. If a state acts beyond its legal capacity under general international law it would not trigger the application of IHRL. Supporters of the extraterritorial application thus argue that jurisdiction in human rights treaties rather reflect a factual notion, the exercise of state power or authority, regardless of the legality of its acts in terms of general international law.

3.2.1.1 Bankovic and Others v. Belgium

During the events of the armed conflict within Former Yugoslavian Republic (FYR), NATO forces conducted military airstrikes over the territory resulting in one of the missiles hitting the building of Radio-Television Serbia killing sixteen people. Several signatory Parties to the ECHR are NATO members. FYR was at the time not a signatory Party to the ECHR. The applicants claimed that the proceedings were compatible *ratione loci* with the Convention since the impugned *acts* of the states, had brought the individuals within the jurisdiction of

⁵¹ Brownlie p. 456

those states.⁵² The respondent states, on the other hand, argued that the application was incompatible *ratione personae* with the Convention, since the *applicants* did not fall within the jurisdiction of the states in terms of Article 1.⁵³ The Court sided with the respondent states and concluded the case inadmissible because the applicants did not fall within the jurisdiction of the respondent states. Following we take a closer look at the Court’s reasoning.

The legal question was “whether the applicants and their deceased relatives were, as a result of the extra-territorial act, capable of falling within the jurisdiction of the respondent States”.⁵⁴ Article 1 of the ECHR express that:

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

The Court begun with the ordinary meaning to be given to the words “within their jurisdiction”.⁵⁵ For the Court this meant that “the jurisdictional competence of a State is primarily territorial” because the term reflecting the traditional concepts of state jurisdiction found in general international law.⁵⁶ The Court reached this conclusion by interpreting the ordinary meaning of the words in light of relevant rules of international law. Accordingly, the Court held that:

“Article 1 of the Convention must be considered to reflect this ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction *being exceptional and requiring special justification* in the particular circumstances of each case”.⁵⁷

The concept of jurisdiction in general international law is to limit the extent of each state’s right to regulate conduct prescribed by domestic and international laws, and this right being limited by the equal rights and sovereignty of other states. For example, if the state conducts a ‘stop and search’ of a foreign vessel on the high seas – with the specific exception

⁵² Bankovic §§30, 46-53

⁵³ Bankovic §§ 31, 35-45

⁵⁴ Bankovic §54

⁵⁵ VCLT Article 31(1)

⁵⁶ Bankovic §59, VCLT Article 31(3)(c)

⁵⁷ Bankovic §61 (emphasis added)

of piracy – its conducts is unlawful because states are not entitled to exercise jurisdiction on the high seas. Had it done the same thing within the limits of its territorial sea, on the other hand, this exercise of jurisdiction is in accordance with the Laws of the Sea.⁵⁸ This is a lawful exercise of territorial jurisdiction within general international law. The notion of “jurisdiction” within the ECHR need not be equivalent to that. Its purpose is to define the scope of signatory States positive and negative obligations under the Convention, regardless of the legitimacy of their acts or omissions. If “jurisdiction” were to be understood in the same sense as jurisdiction within general international law, it would mean that a signatory State, which had lost control over its territory, would be held liable for violations under the Convention. In *Loizidou v. Turkey*, the “effective overall control” Turkey exercised in the occupied territories of Cyprus, was attributable under its jurisdiction, and not Cyprus, precisely because Cyprus no longer had control over this part of its territory.⁵⁹ Within general international law, Cyprus still held the jurisdictional title as the sovereign over the occupied area, but responsibility under the Convention was no longer attributable because it had lost *de facto* control over the areas.

Bankovic then referred to subsequent practice for the clarification of the meaning of Article 1.⁶⁰ Observing that no state had derogated under Article 15, the Court held that this had to indicate a belief that their actions extraterritorially did not involve an exercise of jurisdiction within the meaning of Article 1.⁶¹ Reference to “state practice” as an interpretation method, however, is limited when applied to human rights treaties. Like other human rights conventions, the European Convention has the European Court as its supervisory body entrusted with the function of interpreting and applying the treaty provisions.⁶² Naturally, it follows that to refer to “state practice” for the understanding of the application of human rights treaty, cannot be decisive. In *Wemhoff v. Germany*, the Court stated that it was necessary “to seek the interpretation that is most appropriate in order to realize the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties.”⁶³ Accordingly, the object and purpose of human rights treaties are

⁵⁸ United Nations Convention on the Law of the Sea, Articles 2(1) and 87

⁵⁹ *Loizidou v. Turkey* (Merits) §56

⁶⁰ *Bankovic* §62, VCLT Article 31(3)(b)

⁶¹ *Bankovic* §62

⁶² ECHR Article 19

⁶³ *Wemhoff v. Germany* §8

to protect the rights and freedoms of individuals and thus oblige the State to secure the free enjoyment of these rights. Consequently, if the Court were to interpret Article 1 wider it would place further restrictions on the State Parties. State Parties will thus always argue for a restrictive interpretation. The attitude and practice of these states can therefore not be of decisive value.

The Court also cited the *travaux préparatoires* for support of a restrictive interpretation of Article 1.⁶⁴ Claiming that the preparatory works were not decisive, the Court nevertheless points out that if the drafters had meant for a wider understanding of “jurisdiction” they would have adopted a text similar to that of common Article 1 of the Geneva Conventions, which express that it applies “in all circumstances”.⁶⁵ Any recourse to preparatory works has to be done with caution, because one is always presented with the danger of interpreting the preparatory work instead of interpreting the treaty. In *Loizidou*, the Court even stated that provisions of the Convention could not “be interpreted solely in accordance with the intentions of their authors as expressed more than forty years ago”.⁶⁶ Countless times, the European Court has emphasized that the Convention is a “living instrument” which must be interpreted in light of present-day conditions, and interpreted and applied “so as to make its safeguards practical and effective”.⁶⁷ Therefore, this transparent reliance on *travaux préparatoires* leads to an unfortunate understanding of the text itself. Also, considering that preparatory works are supplementary means of interpretation they shall only be taken into consideration when an interpretation of the text leaves the meaning ambiguous or obscure.⁶⁸

When referring to the *espace juridique* of the ECHR, the Court considered that the “special character of the Convention as a constitutional instrument of European public order”, precluded the extraterritorial application of the Convention.⁶⁹ Observing that FYR was not a signatory State to the Convention, the acts of the respondent states were therefore conducted outside the legal space of the Convention.⁷⁰ In other words, in *Bankovic* the Court emphasize that if the acts occur on the territory of a state not a signatory to the Convention, the jurisdic-

⁶⁴ Bankovic §63, VCLT Article 32

⁶⁵ Bankovic §§65 and 75

⁶⁶ Loizidou (Preliminary Ojections) §71

⁶⁷ See Tyrer v. United Kingdom §31 and Loizidou (Preliminary Objections) §§71-72

⁶⁸ VCLT Article 32(a)

⁶⁹ Bankovic §§56 and 80

⁷⁰ Bankovic §§42 and 80

tion of the signatory Parties will not cover these individuals whom did not enjoy the rights and freedoms of the Convention in the first place.

As noted above, human rights treaties primarily oblige states vis-à-vis individuals. The object and purpose of the Convention are to strengthen the rights and freedoms of the individual. Reference to the object and purpose of a treaty assumes particular importance in the interpretation of human rights treaties. Consequently, any ambiguity in the provisions must be resolved in favor of an interpretation that is consistent with the character of these treaties, which is to promote and secure to the individuals their rights and freedoms, and not restrict them because states have not intended for its wider application.⁷¹

To sum up, by limiting the understanding of “jurisdiction” to something connected to the territory of a State, the Court in *Bankovic* restricts the application of ECHR to any area outside the *espace juridique* of the Convention stating that the Convention was not meant to be applied throughout the world, and thus rules the case inadmissible.⁷² *Al-Skeini* confronts this view, and as we will see, seriously challenge the interpretation the Court made in *Bankovic*.

3.2.1.2 *Al-Skeini v. the United Kingdom*

In *Al-Skeini v. UK*, the Grand Chamber of ECtHR tried to bring some coherence to its previous conflicting case law on the extraterritorial application of ECHR.⁷³ Observing that the Convention is the constitutional instrument of European public order, the Court rightly stated that the Convention does not oblige non State parties or allow Contracting Parties to impose Convention standards on other States.⁷⁴ Then, it went on to state that:

“where the territory of one Convention State is occupied by the armed forces of another, the occupying State should in principle be held accountable under the Convention for breaches of human rights

⁷¹ Orakhelashvili, *The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?*, EJIL 2003, p. 535

⁷² *Bankovic* §§75 and 84

⁷³ As Judge Bonello rightly points out in his Separate Opinion, the Court’s case-law on the subject is based on a need-to-apply patchwork kind of basis: “Principles settled in one judgement may appear more or less justifiable in themselves, but they then betray an awkward fit when measured against principles established in another.” *Al-Skeini* (Separate Opinion) Judge Bonello §§4-5

⁷⁴ *Al-Skeini* §141

within the occupied territory, because to hold otherwise would be to deprive the population of that territory of the rights and freedoms hitherto enjoyed and would result in a ‘vacuum’ of protection within the ‘Convention legal space’ ... However, the importance of establishing the occupying State's jurisdiction in such cases does not imply, *a contrario*, that jurisdiction under Article 1 of the Convention can never exist outside the territory covered by the Council of Europe Member States. The Court has not in its case-law applied any such restriction (see amongst other examples *Öcalan*, *Issa*, *Al-Saadoon and Mufdhi*, *Medvedyev*, all cited above).⁷⁵

The first sentence of this extract confirms that the jurisdiction of the State does include acts occurring outside its own national territory but within the *espace juridique* of the ECHR.⁷⁶ However, the second sentence becomes more interesting. Here, the Court makes an excellent bypass of *Bankovic* by stating that these cases “do not imply, *a contrario*, that the jurisdiction under Article 1 of the Convention can *never* exist outside the territory covered by the Council of Europe Member States”.⁷⁷ Accordingly, the Court concluded that since UK exercised “[some of] the public powers normally to be exercised by a sovereign government”, the “authority and control” British forces exercised over the individuals killed establish a jurisdictional link between them and the UK for the purposes of Article 1 of the Convention.⁷⁸

Opening this window that *Bankovic* wanted to shut, gave the Court in *Al-Skeini* the opportunity to assess whether or not the acts of the UK forces in Iraq were compatible with the Convention. This examination is left to be examined in the next part. However, what this case goes to show is that the European Court has established that where there is a jurisdictional link between the State and the individual, the ECHR is applicable. Accordingly, the ECHR is applicable in times of conflict as well as in times of peace. Next, we will

⁷⁵ *Al-Skeini* §142. The cases that are referred to here, are amongst those cases excluded due to lack of space. To sum up, even though the acts were done outside the territory of the State, jurisdictional link was confirmed in: *Öcalan v. Turkey* because Turkish authorities had effective control over the applicant, §91; in *Issa and Others v. Turkey* because Turkish military forces exercised temporarily effective overall control over some parts of northern Iraq, §§73-73; *Al-Saadoon and Mufdhi v. the United Kingdom* because British Coalition forces exercised de facto control over the detention facilities where the applicant were held, §87; in *Medvedyev and Others v. France* because French agents exercised full and exclusive control over a ship and its crew, §67

⁷⁶ *Loizidou v. Turkey* (Preliminary Objections) §62 and (Merits) §56, *Bankovic* §80

⁷⁷ The Court even says that it “has not in its case-law applied any such restriction”. Firmly opposing the statements in *Bankovic* saying that the Convention was not designed to be applied throughout the world, even in respect of Contracting Parties. *Al-Skeini* §142 (emphasis added to “never”), and *Bankovic* §80.

⁷⁸ *Al-Skeini* §§149-150.

applicable in times of conflict as well as in times of peace. Next, we will examine cases where specific human rights norms have to be interpreted in the context of armed conflicts.

3.2.2 Jurisprudence from the International Court of Justice

3.2.2.1 The Legality of Nuclear Weapons

The first time ICJ dealt with the relationship between IHL and IHRL was in the 1996 advisory opinion on the *Legality of Nuclear Weapons*.⁷⁹ The legal question was the interpretation of the relationship between the ‘right to life’ enshrined in Article 6 of the ICCPR in respect to situations of armed conflict regulated by IHL. The Court began with confirming that human rights law continue *prima facie* to apply in situations of armed conflict:

“The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities.”⁸⁰

By doing this, ICJ elegantly put an end to the long historical trend of rejecting the dichotomy between the ‘law of war’ and the ‘law of peace’, and this alone makes the opinion extremely important. The Court then went on to state its views on the relationship between the human right to life and the rules of IHL relating to the conduct of hostilities:

“The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.”⁸¹

What the Court did was basically to use the general principle of systematic integration set out

⁷⁹ *Legality of the Threat or Use of Nuclear Weapons* (hereafter *Nuclear Weapons*), Advisory Opinion, p. 226

⁸⁰ *Nuclear Weapons* §25

⁸¹ *Nuclear Weapons* §25

in Article 31(3)(c) of the VCLT, which allows the interpreter of a treaty to take into account relevant rules of international law. Article 6 of the ICCPR had to be interpreted with “reference” to the more specific standard of IHL, which were designed specifically for situations of armed conflict. *Lex specialis* did hardly more than indicate that even though it might have been desirable to apply only human rights standards, such a solution would have been too idealistic, bearing in mind the specialty and persistence of armed conflicts.⁸² Nevertheless, the Court emphasized as seen above that the special standards of IHL did not set aside the former. The Court was careful to point out that IHRL continues to apply in situations of armed conflict, and accordingly used *lex specialis* as a method of conflict avoidance. It was the wording of ICCPR Article 6 that allowed for such an interpretation, because what is “arbitrary” deprivation of life can be subjected to an interpretation due to its ambiguity. Both bodies of law applied concurrently. This confirms that the two regimes of international law interact and influence one another. What the Court did not do, on the other hand, was to elaborate to what extent a situation of armed conflict influenced the expression of “arbitrary deprivation of life” under Article 6. In the next case, the Court addresses the applicability in a more detailed context.

3.2.2.2 The Legal Consequences of the Construction of the Israeli Wall

The second time the Court addressed the relationship between IHL and IHRL was in the *Israeli Wall* advisory opinion of 2004.⁸³ The starting point for the applicability of IHL to the construction of the Wall lay with the fact that Palestinian territory is under Israeli occupation.⁸⁴ Then, the Court reiterated the parallel applicability of IHRL in times of belligerent occupation stating that ICCPR, ICESCR and the Convention on the Rights of the Child were applicable to the occupied territories because Israel exercised its territorial jurisdiction as the occupying Power.⁸⁵

⁸² ILC Fragmentation Report §104

⁸³ Legal Consequences of the Construction of a Wall in the Occupied Territory (hereinafter the Israeli Wall), Advisory Opinion, ICJ Report, 2004, p 136

⁸⁴ The standards for applicability of the law of military occupation is that territory “is considered occupied when it is actually placed under the authority of the hostile army”, see the 1907 Hague Regulations Article 42, the Israeli Wall §78.

⁸⁵ The Israeli Wall §§106, 107-113, see ICCPR Article 2(1)

As to the relationship between IHL and IHRL, ICJ did apply the *lex specialis* principle, but in a slightly different way:

“As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.”⁸⁶

The Court makes clear that not all circumstances will require resolving the relationship between IHL and IHRL, because certain matters are regulated only by one, and not the other. However, the Court does not provide any specific clarification of which rules fall within which category, and on what basis. In this case the Court observed that the construction of the Wall led to the destruction or requisition of properties in violation of Articles 46 and 52 of the 1907 Hague Regulations and Article 53 of the Fourth Geneva Convention. The Court pointed out that these destructions were not justified by military necessity.⁸⁷ Furthermore, the Court observed that the construction of the Wall and its associated regime impede the exercise by the Palestinian population in the occupied territory of the right to work, to health services, to education and adequate standards of living, and in violation of the right to freedom of movement and choice of residence protected under international human rights law.⁸⁸ Accordingly, this was a situation of concurrent application of IHL and IHRL, as the Court had suggested, both areas were applicable to the subject matter. However, there was no conflict arising from this parallel application, because the two bodies of law were reinforcing each other.

For the purpose of this paper, let us exemplify the other categories the Court suggested. For example, IHL deals with issues relating to methods of combat, belligerent occupation and combatants, which are outside the purview of IHRL. Similarly, IHRL deals with the aspects of life in peacetime that are not regulated by IHL, such as freedom of press, the right to assembly, to vote and to strike. In these areas, the relevant bodies of law apply without be-

⁸⁶ The Israeli Wall §106

⁸⁷ The Israeli Wall §135

⁸⁸ The Israeli Wall, §§132-134, see ICCPR Articles 12(1) and 17(1), ICESCR Articles 6, 7, 10, 11, 12, 13, 14, and the 1907 Hague Regulations Article 49

ing affected by the other regime. As in this case, where each body of law does regulate the particular issue, but without any disagreement occurring between them, both can be applied in parallel without having to consider the relationship between the two. This can also be the case where one has more detailed regulation, and thus ‘fill the gap’ where the other lack such a detailed regulation. The problem only arises where the two bodies of law are in clear conflict that one must determine the relationship between the relevant norms. When this is the case, the Court again refers to IHL as *lex specialis*.

Criticism have been structured around the manner in which this *lex specialis* approach was used by ICJ.⁸⁹ They express that it differs from that in *Legality of Nuclear Weapons*, for whereas the Court spoke of *lex specialis* nature of IHL with regards to one specific norm - the prohibiting of arbitrary deprivation of life, here it suggested that IHL as a body of law is *lex specialis* to IHRL. If the body of IHL is *lex specialis*, it would entail that whenever a specific human rights norm is in conflict with IHL which cannot be solved by interpretation methods such as harmonization, IHL would prevail all together, setting aside the entire regime of IHRL. In this sense, *lex specialis* function as a method of norm conflict resolution in sense that it sets aside the applicable rules of human rights law. Once *specialis* status has been determined, there can be no accommodations between the specialist and the generalist bodies. The consequences would be that whenever a particular right is addressed by both IHL and IHRL, the generally wider standards of IHL would prevail. If this is to be the case, with IHL rules prevailing over applicable IHRL rules, regardless of specificity or appropriateness, it could create arbitrary results. More importantly, this view would compromise the consensus that IHRL continues *prima facie* to apply in armed conflicts. As Hill-Cawthorne points out, “if the *lex specialis* principle is indeed accepted as governing the relationship between IHL and IHRL, it would seem more appropriate that it be applied at the level of individual norms in specific circumstances, rather than at the level of entire legal regimes.”⁹⁰

⁸⁹ Policy Brief 2007, ‘From Legal Theory to Policy Tools: International Humanitarian Law and International Human Rights Law in the Occupied Palestinian Territory’, p. 8

⁹⁰ Lawrence Hill-Cawthorne, ‘Just Another Case of Treaty Interpretation? Reconciling Humanitarian Law and Human Rights Law in the ICJ’, an article in Mads Andenæs and Eirik Bjørge, *The Centre Reassert Itself*.

3.2.2.3 Democratic Republic of Congo v. Uganda

The third time ICJ addressed the relationship between IHL and IHRL was in the 2005 case of *DRC v. Uganda*.⁹¹ A brief synopsis of the case illustrate that what was initially matter of consensual presence of Ugandan troops on Congolese territory gradually turned into a large-scale use of armed force between DRC and Uganda, triggering the rules of IHL, in particular the rules concerning belligerent occupation. Finding that Ugandan troops had effectively taken control over the Ituri region in Uganda, the Court concluded that Uganda was an occupying Power. It was therefore under obligation to restore and ensure the law in force in the occupied country.⁹² Furthermore, having examined the case file submitted by credible sources, the Court found sufficient evidence to conclude that Ugandan troops had committed serious and widespread human rights and humanitarian law violations in the occupied part of DRC against the lives and property of the Congolese population.⁹³

The Court referred back to the quoted extract above from the *Israeli Wall case*, but, more or less intentionally, left out the last part referring to the principle of *lex specialis*.⁹⁴ Here, the Court concluded that “both branches of international law, namely international human rights law and international humanitarian law, would have to be taken into consideration.”⁹⁵ It went on to apply both IHL and IHRL in parallel, when concluding that Uganda had violated its obligations under both these branches of international law.⁹⁶

The omission of any reference to the *lex specialis* approach can be supported by the sheer facts of the case, which were conducive to the full application of both IHL and IHRL without the need to consider the relationship between the two. For example, the Court found evidence of systematic attacks against the civilian population, which underestimates the right to life protected in Article 51 of Additional Protocol I and in ICCPR and the African Charter on Human Rights.⁹⁷ As seen, the violations committed constitute breaches of both IHL and IHRL, and therefore no question of conflict arose as to how the two bodies of law would

⁹¹ Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda) (hereinafter *DRC v. Uganda*), Judgment, ICJ Reports 2005, p. 168

⁹² *DRC v. Uganda* §§172-180, see Article 43 of the 1907 Hague Regulations

⁹³ *DRC v. Uganda* §§205-211, especially §211

⁹⁴ *DRC v. Uganda* §216

⁹⁵ *DRC v. Uganda* §216

⁹⁶ *DRC v. Uganda* §§217-220

⁹⁷ *DRC v. Uganda* §§206, 219, see Additional Protocol I Article 51

interact. Thus, the Court did not go into the consideration of whether the applicability of one body of law might affect the interpretation of the other.⁹⁸ This is in contrast to the cases that we will examine next.

As noted, ICJ deals with inter-State applications and as a result can apply IHL, which is applicable only between States, whereas the European Court of Human Rights deals with individual application where IHLR applies intra-State. The question in these applications are whether the State has violated any of the rights and freedoms set out in the European Convention vis-à-vis the individual. Accordingly, IHL may impose different obligations and standards on the State, which may conflict with the standards it has to oblige by under the ECHR. It is in these situations that hard cases of real norm conflict arise.

3.3 Specific Human Rights in the Context of Armed Conflicts

3.3.1 The Right to Life v. Military Necessity

Article 2 of the European Convention:

- (1) Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
- (2) Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
 - (a) in defence of any person from unlawful violence;
 - (b) in order to effect a lawful arrest or to prevent escape of a person lawfully detained;
 - (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

Article 2 safeguards the right to life and sets out the circumstances when deprivation of life may be justified. It ranks as one of the most fundamental provisions in the Convention, from which in peacetime no derogation is permitted under Article 15.⁹⁹ Article 2 covers both intentional killing and situations where the legal use of force may result in the unintended taking of a life.¹⁰⁰ Accordingly, the 'right to life' encapsulated in this article is not absolute. Indeed,

⁹⁸ DRC v. Uganda §§219-220

⁹⁹ Isayevav. Russia (hereinafter Isayeva) §172, Ahmet Özkan and Others v. Turkey (hereinafter Özkan) §296

¹⁰⁰ See Ergi v. Turkey (hereinafter Ergi) §79, Özkan §297

deprivation of life can be lawful provided that it fulfils a certain purpose outlined in the second paragraph of the aforementioned Article, or if it falls under Article 15(2) concerning “lawful acts of war”.¹⁰¹ In several cases, the ECtHR have emphasised that the circumstances in which deprivation of life may be justified has to be strictly construed, and subject to the most careful scrutiny.¹⁰² The object and purpose of the Convention as an instrument for the protection of individual human beings also requires that Article 2 be interpreted and applied as to make its safeguards practical and effective.¹⁰³ Furthermore, the words “no more than absolutely necessary” of Article 2(2) indicates a strict interpretation, and thus, required a more compelling test of necessity to be employed than what is normally applicable when determining whether measures taken by the State are “necessary in a democratic society” under paragraphs 2 of Articles 8-11 of the Convention.¹⁰⁴ Accordingly, the force used must be strictly proportionate to the achievement of the aims set out in subparagraphs a-c of Article 2.¹⁰⁵

In addition, Article 2 is considered to enshrine an implicit procedural requirement. According to case law, the obligation to protect the right to life under Article 2, read in conjunction with the State’s general duty under Article 1 to secure to everyone within its jurisdiction the rights and freedoms defined in the Convention, requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force, either by the State or by others.¹⁰⁶ The essential purpose of such an investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility.¹⁰⁷ The measures taken to achieve those purposes are left to the margin of appreciation of the State. However, whatever mode is employed, the

¹⁰¹ ECHR Article 15 allows for derogation “in respect of deaths resulting from lawful acts of war”, that nevertheless is “strictly requires by the exigencies of the situation”. This is a provision that states can use when in situations of armed conflict not to be held liable for breaches under the Convention. Nevertheless, ECHR Article 15(2) has never been assessed in a specific case by the ECtHR because it has never had a case before it where the State has called for its application, thus, relegating the issue of permissibility to the ambit of Article 2.

¹⁰² Isayeva §172, Ergi §79, Özkan §296

¹⁰³ Özkan §296

¹⁰⁴ Isayeva §173, Ergi §79, Özkan §297

¹⁰⁵ Özkan §297

¹⁰⁶ Ergi §82, Özkan §309, Gülec v. Turkey §77

¹⁰⁷ Özkan §310

mere knowledge by the State of a killing gives rise *ipso facto* to an obligation to effectively investigate.¹⁰⁸

A state of ‘military necessity’ is under international law understood as justifying departure from the strict rules of IHL when the necessity of the situation overrules the manner in which the state can conduct its warfare. In the *Hostage Case*, the American Military Tribunal stated that:

“military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life, and money. ... It permits the destruction of life of armed enemies and other persons whose destruction is incidentally unavoidable by the armed conflicts of the war”.¹⁰⁹

The concept of ‘military necessity’ allows for the use of intentional lethal force to kill the enemy. However, the concept must be considered alongside standards of IHL. IHL is precisely there to strike a balance between the principles of military necessity and humanity.¹¹⁰ Accordingly, Article 22 of the 1907 Hague Regulations state that “the right of belligerents to adopt means of injuring the enemy is not unlimited”. Furthermore, ‘military necessity’ has to strike a balance with the two cardinal principles of IHL; (i) the principle of distinction – between the civilian population and military targets reflected in Articles 48 and 51 of Additional Protocol I; (ii) the principle of limited warfare expressed in Article 51 of Additional Protocol I - requiring precautions measures to be taken when choosing means and methods of attack.

3.3.1.1 Isayeva v. Russia

In *Isayeva v. Russia*, Russian forces had conducted a special operation to round up the Chechen rebels with the purpose of destroying or disabling them. When the rebels were forced out of Grozny, they arrived in Katyr-Yurt village, unexpected by the civilian population. In the course of a three-day military operation, the aerial bombing killed or injured several civilians. As a result, the applicant claimed that the use of force by Russian military forces, which resul-

¹⁰⁸ Özkan §310

¹⁰⁹ United States v. List (The Hostage Case), at 1253

¹¹⁰ Michael N. Schmitt, ‘Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance’, p. 798

ted in the deaths of her son and nieces, had violated Article 2 of the European Convention.¹¹¹ Russia, on the other hand, claimed that the attacks and its consequences were legitimate under Article 2(2)(a), i.e. they had resulted from the use of force absolutely necessary in the circumstances for protection of a person from unlawful violence.¹¹² Russia argued that “the use of lethal force was necessary and proportionate to suppress the active resistance of the illegal armed groups, whose actions were a real threat to the life and health of the servicemen and civilians, as well as to the general interests of society and the state”.¹¹³ The Court recognised that the situation in Chechnya at the time “called for exceptional measures by the State” in order to regain control over the area and to suppress the illegal armed insurgency, and suggested that “deployment of army units equipped with combat weapons, including military aviation and artillery” could be such exceptional measures.¹¹⁴ Thus, the Court accepted that the use of lethal force was justified within the exceptions of Article 2(2).¹¹⁵

Next, the Court had to justify whether the measures taken by Russia were “no more than absolutely necessary” for achieving the aims pursued.¹¹⁶ Therefore, the Court had to satisfy that the use of force was strictly proportionate to the achievement of the aims pursued under Article 2(2)(a).¹¹⁷ What was necessary to examine was whether:

“the operation was planned and controlled by the authorities so as to minimise, to the greatest extent possible, recourse to lethal force. The authorities must take appropriate care to ensure that any risk to life is minimised. The Court must also examine whether the authorities were not negligent in their choice of action”.¹¹⁸

¹¹¹ Isayeva §163. Relevant parts of Article 2 reads: (1) Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. (2) Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary: (a); in defence of any person from unlawful violence

¹¹² Isayeva §170

¹¹³ Ibid.

¹¹⁴ Isayeva §180

¹¹⁵ Ibid.

¹¹⁶ Isayeva §181

¹¹⁷ McCann and Others v. the United Kingdom §194

¹¹⁸ Isayeva §175, see also McCann and Others v. UK §194 and Ergi §79

Recalling the facts of the case, the Court found evidence indicating that the arrival of the rebels to Katyr-Yurt was not an unexpected event, but rather anticipated. Therefore, it held that the military had adequate time to plan the measures needed to protect the civilian population.¹¹⁹

It is significant that the substance of these considerations are closely linked to standards under IHL. The principle of distinction requiring that civilians and combatants are held apart seems to have influenced the interpretation of ECHR Article 2.¹²⁰ Furthermore, Article 57 of Additional Protocol I outlines the ‘precautionary measures’ to be taken into consideration when planning and conducting an attack. In paragraph 2(a)(i) it states that commanders have to do “everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects”. Also under Article 57(2)(c) of the same Protocol, “effective advanced warning shall be given of attacks which may affect the civilian population”. Accordingly, the Court promulgates standards that are largely derived from IHL without explicitly referring to this *corpus juris*. In this sense, it interprets Article 2(2) broader than what the text itself gives rise to. Using these humanitarian principles without even respectively mentioning them in its argumentation, gives rise to the danger of applying these well-established standards of IHL wrongly.

Another assessment the Court had to make was whether the choice of weapons and methods that were used had been planned in such a way as to minimize their danger upon civilians.¹²¹ The Court declared that:

“using this kind of weapon in a populated area, outside wartime and without prior evacuation of the civilians, is impossible to reconcile with the degree of caution expected from a law-enforcement body in a democratic society. ... Even when faced with a situation where, as the Government submit, the population of the village had been held hostage by a large group of well-equipped and well-trained fighters, *the primary aim* of the operation should be to protect lives from unlawful violence. The massive use of indiscriminate weapons stands in flagrant contrast with this aim and cannot be considered compatible with the standard of care prerequisite to an operation of this kind involving the use of lethal force by State agents”.¹²²

¹¹⁹ Isayeva §184

¹²⁰ See Additional Protocol I Articles 48, 51, 57.

¹²¹ Isayeva §§184-189

¹²² Isayeva §191 (emphasis added)

Accordingly, the massive use of indiscriminate weapons in a populated area without taking all the precautions to protect the civilians was conceived as disproportionate. Again, the resemblance of this argumentation with IHL principles is inevitable. Article 57 paragraph 2(c)(iii) of Additional Protocol I requires that the commanders constantly take into consideration the risks imposed to the civilian population when planning military attacks, and if necessary, cancel the attacks if the risk of civilian casualties are higher than the military advantages gained as a result. The same article clearly states that all feasible precautions in the choice of means and methods employed shall aim at minimising the loss of civilian life, and effective warning mechanisms shall be given to the civilian population.¹²³ The Court thus considers that the special circumstances arising from an armed conflict has to be taken into consideration when interpreting Article 2, but that it nevertheless should be “the primary aim” of the State to oblige by its obligations under the Convention.¹²⁴ This statement can be understood as saying that even if a situation of armed conflict makes it necessary to use lethal force, the State still has to oblige by its obligations under the ECHR.

More importantly, under IHL there is as an explicit distinction between “civilians” and “combatants”. In contrast to “civilians”, combatants are those “participating directly in hostilities”.¹²⁵ As a result, IHL uses a decisive language for the distinction process. Under human rights law, on the other hand, this distinction is not necessary. IHRL applies to all peoples by virtue of being human beings, regardless of their status under other fields of international law. Nevertheless, the Court in the *Isayeva* case uses a language infected by this distinction between civilians and non-civilians special to IHL. Using this kind of humanitarian language without making an effort to define the terms within IHRL, causes some confusion as to the Court’s implicit use of IHL principles when interpreting the Convention. Noëlle Quénivet thus expresses that: “to speak of the principle of discrimination in context of HRL is unmistakably a *contradictio in terminis* since HRL is based on the idea that all human beings are equal and should be treated as such.

To certain extent, the Court disregards the rights of those who are labelled fighters or

¹²³ See Additional Protocol I Article 57 § 2 (a) (ii) and (c).

¹²⁴ *Isayeva* §191

¹²⁵ Additional Protocol I Article 43. Also see Additional Protocol II Article 13: Civilians shall enjoy the protection afforded by this Part, unless and for such time as they take a direct part in hostilities.

combatants in the name of the *lex specialis* rule which is predicted on the premise that lethal force will be used and individuals killed”.¹²⁶ The use of this humanitarian language and assessment by the Court, without any reference to particular humanitarian rules and the understanding within this regime of their meaning, is unfortunate, especially when the Court’s use of these considerations comes close to the application of its principles almost by analogy. Even though the jurisdictional scope of the European Court does not extend to the direct application of rules of humanitarian law, using IHL as means of interpretation of IHRL is an indirect way to achieve compliance with IHL. This compliance could be achieved through the expressed use of VCLT Article 31(3)(c), and in many cases the ECtHR have emphasised this interpretation tool and used general international law in its interpretations of the rules under the Convention.¹²⁷ Nevertheless, *Isayeva* shows that the ECtHR is willing to examine the standards of the Convention with the help of prominently IHL principles. However, the Court only implicitly referred to these standards, and only because they helped to interpret Article 2 in the specific contexts of armed conflicts. As Orakhelashvili states, “[i]n general the decisions of the European Court of Human Rights on the matter of the right to life in armed conflict demonstrates that even though Article 2 of the Convention, drafted as a general clause, does not elaborate upon the specific conduct that may be expected by the Military in such contingencies, in terms of precaution, proportionality, and necessity, it can nevertheless be applied as having an effect on armed conflict comparable to that which the consistent application of the detailed provisions of the 1977 Additional Protocol would have in internal armed conflicts”.¹²⁸

¹²⁶ *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* p. 344

¹²⁷ This is also difficult to understand inasmuch as the Court is obliged by virtue of Article 15(1) to take into consideration any relevant international law when interpreting the Convention in a situation of state of emergency. However, since this article is never invoked by the states when using force leading to deaths, this provision cannot be applied.

¹²⁸ Orakhelashvili, ‘The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?’, p. 173

3.3.2 Procedural Safeguards

3.3.2.1 Ergi v. Turkey

In *Ergi v. Turkey*, the Court did not find it established beyond reasonable doubt that the bullet which had killed the applicant pursuant to the armed clash between national forces and terrorist rebels, had been fired by Turkish security forces. Nevertheless, the Court declared that it had to consider whether the security forces' operation had been "planned and conducted in such a way as to avoid or minimise, to the greatest extent possible, any risk to the lives of the villagers", and whether the means and methods applied met these requirements.¹²⁹ Relying on the Commission's findings of facts in the case, the Court stated that there was no information to indicate that any steps or precautions had been taken to protect the villagers from being caught up in the conflict.¹³⁰ Furthermore, regarding the procedural safeguards enshrined in Article 2, the Court also established that the authorities had failed to carry out an effective investigation into the circumstances surrounding the applicant's death.¹³¹ Accordingly, the Court concluded that there had been a violation of Article 2.¹³²

Upon concluding that Turkey had violated the Convention requirements, the Court expressed some form of empathy to the crucial situation in south-east Turkey. Nevertheless, the Court emphasised that regardless of the prevalence of violent armed clashes or the high incidence of fatalities occurring, the State could not displace the obligation under Article 2 to ensure that an effective, independent investigation is conducted into the deaths arising out of clashes involving the security forces.¹³³ This goes to show that situations of internal armed conflicts, governed especially in humanitarian law, still require the State to fulfil its obligations under the Convention, regardless of the harshening circumstances caused by an internal armed conflict. The Court would not interpret Article 2 as to restrict its application in such circumstances, however, the distinct approach to the question of necessity under Article 2

¹²⁹ *Ergi* §79

¹³⁰ *Ergi* §80

¹³¹ *Ergi* §85

¹³² *Ergi* §86

¹³³ *Ergi* para 85

resemblance that of proportionality under IHL with regards to the principle of distinction between the civilian population and military objects when planning an attack.¹³⁴

3.3.2.2 Özkan v. Turkey

Recalling the Courts considerations in *Ergi*, the Court established that the planning, conduct of the operation, and the means and methods applied did met the threshold of necessity enshrined in Article 2(2).¹³⁵ However, regarding the procedural requirements of Article 2, the Court stated that for the investigation to be effective it is required that the persons responsible for and carrying out the investigation to be independent from those implicated in the events. This meant not only “a lack of hierarchical or institutional connection but also a practical independence”.¹³⁶ Concluding that such an effective investigation was not done in this case, the Court again was “mindful” of the special security issues in these areas of south-east Turkey, but that the State nevertheless had to meet the requirements under the Convention.¹³⁷ A situation of internal armed conflict, lasting several decades, could not be a sufficient ground for restricting the requirements upon a State to fulfil its obligations under the Convention faithfully.

What both these cases show, is that the Court when applying Article 2, does use humanitarian vocabulary when interpreting the threshold of necessity as to fill the gaps the Convention is left with in the context of armed conflicts. The Court did not state that the standards of Article 2 when applied to special circumstances of armed conflict gave rise to a different standard of protection. What the Court seem to have done is to have taken into consideration the special circumstances arising from such a situation, but that it nevertheless did not allow for a restrictive interpretation of the Article. This is another way of saying that the ECHR applies both in peacetime and in times of conflict. The protection given by the Convention to individuals is not altered by extraordinary circumstances unless the State has lawfully derogated under Article 15. Staying true to its roots as a human rights body, the Court therefore

¹³⁴ See Additional Protocol I Articles, 48, 51 and 57, which we come back to later. Also see Nuclear Weapons §78, which emphasise this cardinal principle of distinction. This principle is also considered to be customary international law.

¹³⁵ Özkan §§305-308

¹³⁶ Özkan §§311

¹³⁷ Özkan §319, also Gülec §85

seems to not take into consideration any applicable rules of IHL that might alter this protection.

3.3.2.3 Kononov v. Latvia

In *Kononom v. Latvia*, the applicant, a former Soviet partisan during World War II, had been convicted by the domestic courts of Latvia for war crimes under its domestic law, which were based on international law.¹³⁸ The question was whether the principle of law - accessibility and foreseeability – of Article 7 under ECHR had been violated.¹³⁹ In the domestic laws of states, criminal law has to meet the requirements of this principle, however, there is an element of judicial interpretation incumbent in this area of law. Accordingly, the Article allows for domestic courts to clarify the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen.¹⁴⁰ Moreover, this also applies where domestic law refers to rules of general international law or international agreements.¹⁴¹

The Court stated that its task was not to decide directly whether the provisions of international law were compatible with ECHR, but whether the interpretation of the former by the domestic courts were compatible with the latter.¹⁴² In this sense, the Court entered into the realm of IHL through the backdoor. Both the applicants and the respondent Governments had in their public hearings relied heavily on provisions of international criminal law and IHL, such as the Geneva Conventions, Additional Protocols I and II, 1907 Hague Regulations and customary humanitarian law.¹⁴³ Accordingly, the Court had an excellent opportunity to assess the relationship between IHL and IHRL without it being a politically disputed issue by the respondent Governments. If they themselves had interpreted and applied IHL in their domes-

¹³⁸ Kononov v. Latvia (hereinafter Kononov) §196. Also see the similar case of Korbely v. Hungary (hereinafter Korbely) §74

¹³⁹ The relevant part of ECHR Article 7(1) reads: No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

¹⁴⁰ Kononom §196, also Korbely §71

¹⁴¹ See Korbely §72

¹⁴² Kononov §197, also Korbely §72

¹⁴³ Kononov §§52-96, also Korbely §§48-52

tic courts, then this gave the Court an opportunity to assess whether or not their interpretational outcomes were compatible with the standards set out in the Convention, more precisely, with Article 7. However, in order to decide whether or not the domestic courts themselves had interpreted and applied IHL correctly, the Court itself had to independently interpret these provisions and apply them to the concrete case. Having regard to the subject matter – crimes of war – the Court had to examine two things: first, whether there was a sufficiently clear legal basis for the applicant’s conviction of war crimes, and secondly, examine whether those offences were defined by law with sufficient accessibility and foreseeability so that the applicants could have known that his acts and omissions would make him criminally liable for such crimes and accordingly had an opportunity to regulate his conducts thereby.¹⁴⁴

In *Kononov*, the Court, referring to applicable *jus in bello* being the laws of war, held that the ill-treatment, wounding and killing of the villagers which the applicant had been convicted for under domestic law, constituted a war crime under IHL.¹⁴⁵ The Court referred explicitly to Article 23(c) of the 1907 Hague Regulations, which forbids the killing or wounding of “an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion” (*hors de combat*).¹⁴⁶ Furthermore, the Court stated that the additional conviction of the applicant with regards the treacherous wounding and killing, also constituted a war crime under IHL, and referred to Article 23(b) of the 1907 Hague Regulations which prohibits the “treacherously [killing or wounding of] individuals belonging to the hostile nation or army”.¹⁴⁷ Accordingly, having confirmed that the domestic courts had sufficient legal basis in IHL to convict the applicant for the crimes of war, it turned to the question whether these provision were compatible with the requirements under Article 7 as accessible and foreseeable.

The Court recalled that the concept of foreseeability depends considerable “on the content of the instrument in issue, the field it is designed to cover and the number and status of those to whom it is addressed”, and that any “person carrying on a professional activity must proceed with a high degree of caution when pursuing their occupation and can be expected to

¹⁴⁴ *Kononov* §187, also *Korbely* §73

¹⁴⁵ *Kononov* §216

¹⁴⁶ *Ibid*

¹⁴⁷ *Kononom* §217

take special care in assessing the risks that such activity entails”.¹⁴⁸ Then the Court went on to state that the applied IHL constituted “detailed *lex specialis* regulations fixing the parameters of criminal conduct in a time of war, primarily addressed to armed forces and, especially, commanders”.¹⁴⁹ Given that the applicant had the status of commander sergeant, the Court was of the view that he could have been reasonably expected to take special care in assessing the consequences of his actions.¹⁵⁰ For these reasons the Court concluded that the offences were both accessible and foreseeable for the applicant, and thus did not constitute a violation of Article 7(1) of the ECHR.¹⁵¹

This case goes to show that the European Court has gradually accepted the income of IHL in its interpretation and application of the Conventional standards. From only referring to IHL *sub silentio* in *Isayeva, Ergi and Özkan*, this time the Court made extensive references to IHL when interpreting Article 7. Even though the Court stated that its task was to interpret the domestic courts’ use of IHL, it nevertheless had to interpret these standards separately when confronting them with the standards of the Convention. The subject matter being “war crimes” also made IHL the *lex specialis* of applicable law. This statement by the Court is remarkably considering its traditional reluctance to even refer to relevant rules of IHL when assessing cases in the context of armed conflicts. This is definitively a step in the right direction. As we will see in the next cases, this openness to include IHL as a relevant source of interpretation becomes crucial in the cases arising from Member States’ participation in armed conflict and occupation in places such as Iraq.

3.3.2.4 Al-Skeini v. the United Kingdom

When we analysed the *Al-Skeini* case above, the perspective was the ECtHR approach to the question of extraterritorial application of the European Convention. This case confirmed that the meaning of “within their jurisdiction” of Article 1 also included the acts of a State violating the Convention outside the national territory of the State. When we turn our attention to the merits, the applicants claimed that UK had breached the procedural requirement of Article 2 to carry out an effective investigation into killings caused by British forces. The UK argued

¹⁴⁸ Kononov §235

¹⁴⁹ Kononom §238

¹⁵⁰ Ibid.

¹⁵¹ Kononom §244-245

that the procedural duty under Article 2 had to be interpreted in harmony with the relevant principles of international law, and that any implied duty should not be interpreted in such a way as to place an impossible or disproportionate burden on a Contracting State.¹⁵² The applicants, on the other hand, emphasised that the Court's case law regarding south-eastern Turkey demonstrated that the procedural duty under Article 2 was not interpreted restrictively by reference to security problems in a conflict zone.¹⁵³

The Court begun by acknowledging the security problems arising in the aftermath of the invasion of Iraq, where serious breakdowns in the civilian infrastructure, including the law enforcement and criminal justice systems made the efforts of the Coalition Forces difficult.¹⁵⁴ However, the object and purpose of the Convention as an instrument of protection of individual human beings required that “its provisions be interpreted and applied so as to make its safeguards practical and effective”.¹⁵⁵ Recalling the conclusions in *Ergi* and *Özkan*, the Court held that the procedural requirement under Article 2 continued to apply in difficult security conditions, including armed conflict.¹⁵⁶ Nevertheless, the Court held that:

“[However] the investigation should *also* be broad enough to permit the investigating authorities to take into consideration not only the actions of the State agents who directly used lethal force but also *all the surrounding circumstances*, including such matters as the planning and control of the operations in question, where this is necessary in order to determine whether the State complied with its obligation under Article 2 to protect life”.¹⁵⁷

Following this statement, the Court further acknowledged the difficulties and obstacles which takes place in the context of armed conflicts, and even that concrete constraints may compel the use of less effective measures of investigations.¹⁵⁸ Nevertheless, the Court still emphasized that even in these situations, Article 2 required that “all reasonable steps must be taken to ensure that an effective, independent investigation is conducted into alleged breaches

¹⁵² Al-Skeini §152

¹⁵³ Al-Skeini §158

¹⁵⁴ Al-Skeini §161

¹⁵⁵ Al-Skeini §162

¹⁵⁶ Al-Skeini §164

¹⁵⁷ Al-Skeini §163

¹⁵⁸ Al-Skeini §164

of the right to life”.¹⁵⁹ The Court declared that for an investigation to be effective, measures such as securing evidence, testimonies, forensic evidence and, where appropriate, an autopsy should be amongst those methods.¹⁶⁰ Including the independence of the investigator, the requirements of promptness and reasonable expedition should also be met.¹⁶¹

When applied to the case, the Court called for the procedural duty under Article 2 to be “realistically” applied.¹⁶² In this case, the Court concluded on the main ground that the investigating body was not operationally independent because of the lack of institutional independence of the investigators from the military chain of command.¹⁶³ Nevertheless, this case still raises the question of how far the ECtHR will go to stretch the procedural duty to make it applicable realistically in the context of armed conflicts. It showed that it would take into considerations the difficulties arising, and not demand unrealistic duties from the Parties.

3.3.3 The Right to Liberty v. Preventive Detention

Preventive detention, also called internment, is among those issues where the complex interplay between IHL and IHRL is felt most acutely.¹⁶⁴ It is an area of potentially irresolvable norm conflict. Under IHL an Occupying Power have legal basis for preventive detention of both prisoners of war and protected persons during an international armed conflicts. First, under Article 21 of the third Geneva Convention, prisoners of war may be subjected to internment, i.e. they may be detained on purely preventive grounds so that they do not rejoin the hostilities.¹⁶⁵ Under this provision, it is not required by the detaining power to prove that it is necessary to detain. Secondly, under Articles 41-43 and 78 of the fourth Geneva Convention, protected persons may also be subjected to internment “if the security of the Detaining Power makes it absolutely necessary”.¹⁶⁶ Accordingly, IHL poses a stricter requirement for the in-

¹⁵⁹ Ibid.

¹⁶⁰ Al-Skeini §166

¹⁶¹ Al-Skeini para 167

¹⁶² Al-Skeini para 168

¹⁶³ Al-Skeini para 169-177

¹⁶⁴ Nobuo Hayashi, ‘Do the Good Intentions of European Human Rights Law Really Pave the Road to IHL Hell for Civilian Detainees in Occupied Territory?’, p. 1

¹⁶⁵ ‘Prisoners of war’ (POWs) see Article 4 of the Third Geneva Convention

¹⁶⁶ Fourth Geneva Convention Article 42

ternment of civilians than of combatants. In IHRL, different instruments have different regulations of detention. CCPR Article 9(1) provides that:

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

ECHR Article 5 stipulates that:

Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law.

Article 9(1) of the CCPR prohibits “arbitrary” arrest or detention. What is an “arbitrary” arrest or detention is not defined in the Covenant, and is open for interpretations due to its vagueness. On the contrary, Article 5(1) of the ECHR contains an exhaustive list of permissible exceptions in subparagraphs a-f. Therefore, no deprivation of liberty will be compatible with Article 5(1) unless it falls within one of those exceptions, or provided that the State has derogated legally under Article 15 of the Convention. As we have seen in *Nuclear Weapons*, ICJ stated “arbitrary deprivation of life” in IHRL was to be determined through interpretation of the special rules of IHL. *Lex specialis* was used as a norm for conflict avoidance. The ‘arbitrariness’ standard in CCPR Article 9(1) could be interpreted while taking into account the rules of IHL. If this is applied to ECHR Article 5(1), we are left with a problem. This provision, as stated above, has exhausted any ‘window’ with which IHL could enter through interpretation. This was exactly the circumstance in the case of *Al-Jedda v. the United Kingdom*, which we will now turn our attention to.

3.3.3.1 Al-Jedda v. the United Kingdom¹⁶⁷

The applicant claimed that the UK had violated Article 5(1) of ECHR following his three year long detention based on “imperative reasons of security” in a British military facility in Iraq

¹⁶⁷ This case runned its course in the British legal system before it was brought to ECtHR, for this, see *The Queen (on the application of Hilal Abdul-Razzaq Ali Al-Jedda) v. Secretary of State for Defence*, Judgment of 12 August 2005, Case No. CO/3673/2005

without any criminal charges being brought against him.¹⁶⁸ The Court held that “it has long been established that the list of grounds of permissible detention in Article 5 § 1 does not include internment or preventive detention where there is no intention to bring criminal charges within a reasonable time.”¹⁶⁹ UK did not contend that the detention was justified under subparagraphs a-f, nor Article 15. Instead, they argued that there was no violation of Article 5(1) because UK’s duties under that provision were displaced by the counter-duty imposed by the United Nations Security Council Resolution 1546. They contended that, as a result of the operation of Article 103 of the UN Charter, the obligations of UN Member States to “accept and carry out decisions of the Security Council” under Article 25 of the Charter, prevailed over those under the European Convention.¹⁷⁰ The legal question was whether UN Security Council Resolution 1546 placed UK under an obligation to hold the applicant under detention contrary to its obligations under Article 5(1) of the ECHR.

The Court did not consider that the language used in this Resolution indicated unambiguously that the Security Council intended to place Member States within the Multi-National Force under an obligation to use measures of indefinite internment without charge and without judicial guarantees, in breach of their undertakings under international human rights instruments including the Convention.¹⁷¹ Internment was not expressly referred to in the Resolution itself but rather in the annexed letter from the US Secretary of State.¹⁷² The Court even established an interpretative presumption that the Security Council did not intend to ‘oblige’ its Member States to do something contrary to their obligations under human rights law, and therefore concluded that the Resolution could not be interpreted as obliging a Member State to use internment. Accordingly, it was not needed to use Article 103 of the UN Charter because there were no contradictory obligations.

Another question was whether IHL gave rise to a legal basis for the preventive detention of the applicant.¹⁷³ The UK claimed that the “special authorities, responsibilities and obligations” of the Occupying Power expressed in the Resolution 1546, gave UK the obligation

¹⁶⁸ *Al-Jedda v. the United Kingdom* (hereinafter *Al-Jedda*) §98

¹⁶⁹ *Al-Jedda* §§99-100

¹⁷⁰ *Al-Jedda* §89

¹⁷¹ *Al-Jedda* §105

¹⁷² See Security Council Resolution 1546, p.11

¹⁷³ *Al-Jedda* §107

under IHL to use internment.¹⁷⁴ The Court could not find it established that IHL placed an obligation on an Occupying Power to use indefinite internment without trial.¹⁷⁵ The Court held that Article 43 of the Hague Regulations requires an Occupying Power “to take all measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country”. Then the Court stated that “it would appear from the provisions of the Fourth Geneva Convention that under international humanitarian law internment is to be viewed not as an obligation on the Occupying Power but as *a measure of last resort*”.¹⁷⁶ This is where it gets complicated. What did the Court mean by “last resort”, and what would make internment “a measure of last resort”?

Article 42 of the Fourth Geneva Convention expresses that “internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary”. Under IHL, internment of protected person can only be ordered when it is “absolutely necessary”, and under Article 78 of the same Convention, the Occupying Power can consider internment if “necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment”. Internment is considered a “severe” measure” according to Article 41, but it does not say that other measures must be exhausted before internment can be considered.¹⁷⁷ The expression “last resort” can imply that other measures must be exhausted before internment can be allowed. Such an understanding can also imply that the measure of “last resort” is also the most “severe” measure to be undertaken. Accordingly, the Court could have interpreted the above noted Articles of the Geneva Convention as expressing such an understanding of internment. Not that all other measures had to be exhausted, but contrary to internment, other measures failed or would have failed to meet the requirements of imperative security reasons. This is also supported in the plain text of Article 41 and 42. They stipulate, respectively, that internment is the most severe measure to which the authorities may resort to if they consider other measures of control “inadequate”, and that such recourse may be required only where “the security of the Detaining Power makes it absolutely necessary”. It is not required by the Detaining Power to give reasons for why internment is absolutely neces-

¹⁷⁴ Ibid.

¹⁷⁵ Ibid.

¹⁷⁶ Ibid. (emphasis added).

¹⁷⁷ Nobuo Hayashi, p. 6

sary and other measures being inadequate. The law of belligerent occupation empowers, but it does not obligate, the occupation authorities to detain on security grounds.¹⁷⁸ Accordingly, internment under IHL was also not considered to be the only measure a Detaining Power could resort to, and thus, the UK was neither in the Security Council Resolution nor under IHL obliged to use internment, and therefore there did not exist a norm conflict. As a result, the Court when applying its jurisdiction under Article 19 of the ECHR to interpret Article 5(1) concluded a violation of the Convention duty not to use internment.¹⁷⁹

In *Al-Jedda*, the Court went to great lengths to harmonize the text of the Resolution and the provisions of IHL with Article 5 of the ECHR. Interpreting “authorization” to take all measures necessary to maintain security and stability as only giving the Member States an opportunity to choose among the measures available, and not directly “obliging” the Member States to use internment, show how far the European Court will go to avoid any norm conflict. In *Nada v. Switzerland* this was expressed by the Court in these words:

“[w]here a number of apparently contradictory instruments are simultaneously applicable, international case-law and academic opinion endeavour to construe them in such a way as to coordinate their effects and avoid any opposition between them. Two diverging commitments must therefore be harmonised as far as possible so that they produce effects that are fully in accordance with existing law”.¹⁸⁰

The Court could have approached the matter differently. Had the Security Resolution or IHL obliged the Member States to use internment, the Court could still have concluded that under its jurisdiction it can only apply the ECHR and regardless of what Article 103 or *lex specialis* of IHL would entail, the Court can only apply ECHR and accordingly constitute a breach of Article 5(1).¹⁸¹

The reluctance of the European Court to declare explicitly the existence of a clear

¹⁷⁸ Nobuo Hayashi p. 7

¹⁷⁹ *Al-Jedda* §§107-110

¹⁸⁰ *Nada v. Switzerland* §170

¹⁸¹ *Nada v. Switzerland* §168: “According to established case-law, a Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations. Article 1 makes no distinction as to the type of rule or measure concerned and does not exclude any part of a Contracting Party’s “jurisdiction” from scrutiny under the Convention.”

norm conflict is consistent. Had the Resolution text been clear, however, it would be a clear norm conflict, and the Court could not have harmoniously interpreted in good faith. The solution would have had to be that the obligation under the Convention would be set aside to the extent that it conflicted with obligations pursuant to Article 103 of the UN Charter.¹⁸² The obligations under article 103 would “prevail”, but not invalidate the conflicting treaty norm. The State is merely prohibited from fulfilling an obligation arising under that other norm.¹⁸³

In *Al-Jedda* none of the listed sub-paragraphs could faithfully be interpreted as allowing for preventive detention.¹⁸⁴ Accordingly, in the absence of derogation under Article 15, Article 5(1) cannot be interpreted as to contain an arbitrariness standard such as CCPR Article 9(1). Had ECHR encapsulated such “arbitrariness” standards, the arguments used by the ICJ in *Nuclear Weapons* case, could have been applied by ECtHR. The definition of arbitrary deprivation of liberty in the context of an armed conflict could then be considered through the prism of IHL based on the *lex specialis* principle that governs the relationship between the two bodies of law. Without such a wording, if either a Security Council Resolution in the future or provision under IHL did impose a duty of preventive detention, there would exist a clear norm conflict, which could not be harmonized through interpretation. If ECHR were to be forcibly interpreted in such a way, to paraphrase Lord Bingham’s view of such practices in the context of the Human Rights Act 1998, it would not constitute “judicial interpretation, but judicial vandalism”.¹⁸⁵ As Milanovic argues, “it would in effect amount to a court *disregarding* a clear norm emanating from one treaty in favour of another, on the basis of a *policy* judgement as to the norm’s desirability, reasonableness, or effectiveness”.¹⁸⁶ If *lex specialis* is to be understood as a rule of norm conflict resolution, on the other hand, it would entail that IHL prevails over ECHR Article 5(1). This understanding of the maxim is the only one compatible for allowing a state to preclude its responsibilities under the European Convention in a situation of armed conflict without it using the derogation clause. Nevertheless, such an understanding of *lex specialis* is not found neither in the text of the relevant treaties nor in the case law of international courts. Contrary, in all cases noted above; *Nuclear Weapons*, *The*

¹⁸² ILC Fragmentation Report §333

¹⁸³ Ibid. §334

¹⁸⁴ *Al-Jedda* §99

¹⁸⁵ Quoted in Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy*, p. 242

¹⁸⁶ Ibid. p. 250

Wall, *DCR v. Uganda*, all confirm that IHRL continues to apply in times of armed conflict alongside IHL. IHL affected only one aspect, namely the relative assessment of ‘arbitrariness’.¹⁸⁷ For violations of human rights obligations not to be liable to the state in situations of armed conflict governed by IHL, the only recourse is to activate the derogation clause of Article 15. Only then can IHL said to be applied *lex specialis* as a rule of norm conflict resolution setting aside the derogated provisions of IHLR.

4 CONCLUSION

The confirmation by the ECtHR that the European Convention applies extraterritorially reinforces the understanding that it cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory. If IHL and IHRL have a common and identical interest in the protection of the individual from all possible threats to his person, in peacetime and in conflict, it is necessary that both these two fields of international law find complementarity. This appeal of universality, most certainly serves the object and purpose of the human rights conventions in securing the rights and freedoms to *all* individuals whoever they are and wherever they may be. Both the ECtHR and States need to move beyond the debate on whether States have extraterritorial human rights obligations and toward determining what human rights obligations we can realistically expect States to uphold in situations of armed conflict.¹⁸⁸

The extensive analysis of the case-law on the relationship between IHRL and IHL shows that human rights law continues to apply in situations of armed conflict. However, how they interact is understood differently. The jurisprudence of ICJ suggests that IHL is the *lex specialis* of IHRL. In *Nuclear Weapons* this meant that what was an arbitrary deprivation of life under Article 2 of ECHR was to be decided by reference to IHL standards. In the *Israeli Wall* case, ICJ approached the relationship between IHL and IHRL as either being mutually exclusive, or applicable together. The problem only arises where the two bodies of law are in clear normative conflict. If so, the body of IHL were to be applied as *lex specialis*. This ap-

¹⁸⁷ ILC Fragmentation Report §104

¹⁸⁸ A whole other question is how the Court will bear the weight of mass applications that may derive from large-scale armed conflicts. It has been reported that already 2,000 applications by Ossetians have been filed against Georgia.

proach by the *Israeli Wall* met harsh criticism and ICJ seems to have distanced itself in the next case of *DRC v. Uganda* where the Court reaffirmed that both branches of international law could be applied in parallel.

What these cases confirm is that IHRL continues to apply in times of conflict, and both are mutually reinforcing the protection offered to the individual. However, none of these cases dealt with an actual norm conflict as understood above, because all cases applied IHL and IHRL without having to confront the two systems. This is different in the European and American human rights systems. Having only the jurisdiction to interpret and apply the respective human rights Conventions, put these supervisory bodies in great difficulties when confronted with allegations of treaty violations occurring in the context of armed conflicts. Since the jurisdictional competence of the ECtHR is not expected in near future to expand, the use of interpretation techniques such as systematic integration will be an important step in the development of the European Convention on Human Rights' protective mechanisms, and one which will enhance the Court's authority.

Our research show that the ECtHR will go to great lengths to harmonise the interpretation of ECHR so as to meet the challenge facing its application. Having to accept that the ECHR contains very few explicit references to situations of armed conflict, the European Court had to require a whole new vocabulary and adapt its interpretation to this new reality. In *Ergi*, *Özkan*, and *Isayeva*, the Court implicitly used IHL standards as to provide the much needed flexibility of Article 2 in the context of armed conflict. This constitute a warning that even if the protection in one of the fields is found to be less than in the other field, the applicability of the them together will provide the needed protection.¹⁸⁹

However, it must be kept in mind that while international judicial courts are independent bodies, which cannot be swayed by political considerations, they do not function in isolation from the context which surrounds them. The Court's approach to IHL implicitly in cases such as *Ergi*, *Özkan*, and *Isayeva*, may have been influenced by the atmosphere surrounding the cases and the States' reluctance to have IHL applied to them. Nevertheless, from only referring to IHL *sub silentio* in these cases, in *Kononov v. Latvia*, the Court made extensive references to IHL when interpreting Article 7. This was followed in the *Al-Jedda* and *Al-Skeini* cases, where the Court interpreted the question of preventive detention under IHL in direct

¹⁸⁹ Orakhelashvili, 'The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?', p. 163

confrontation with Article 5 of the ECHR. This goes to show that, as the situations evolved and the Court was made to deal with more cases arising from conflict areas, the Court became more and more comfortable to use IHL standards and eventually also refer to them explicitly. As Magdalena Forowicz puts it: “the ECHR regime may therefore still be portrayed as a self-reinforcing, but certainly not a self-sufficient regime”.¹⁹⁰

Accordingly, systematic integration of IHL when interpreting IHRL has become an important interpretation method so as to avoid any gaps in the protection of the individual. Nevertheless, the Court being the guardian of the ECHR, largely frame the desire to apply IHL standards in its reasoning only when they promote the protection under the Convention, and not when they restrict its application. Accordingly, our examination also shows that the Court does not approach the relationship between IHRL and IHL so as to reduce its fragmentation. The interpretational techniques available to avoid fragmentation have been used by the Court with the aim of contributing the enhancement of the European system of human rights protection rather than to enhance the unity of international law. If the protection under IHRL will be reduced as a result of differing standards under IHL, the Court refuses to interpret the Convention restrictively, as seen in the cases of *Al-Skeini* and *Al-Jedda*.

¹⁹⁰ Magdalena Forowicz, ‘Factors Influencing the Reception of International Law in the ECtHR’s Case Law: An Overview’, *The Centre Reasserts Itself*

ABBREVIATIONS

ACHR	American Convention on Human Rights
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social, and Cultural Rights
ICJ	International Court of Justice
IHL	International humanitarian law
IHRL	International human rights law
ILC	International Law Commission
ECHR	European Convention on Human rights
ECtHR	European Court of Human Rights
FYR	Former Yugoslavian Republic
NATO	North Atlantic Treaty Organization
UN	United Nations
VCLT	Vienna Convention on the Law of Treaties

BIBLIOGRAPHY

BOOKS

James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, Eighth Edition).

Oscar Schachter, *International Law in Theory and Practice*, (Martinus Nijhoss Publishers, 1991).

Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy*, (Oxford University Press, 2011).

Mads Andenæs and Eirik Bjørge, *The Centre Reassert Itself*, (Cambridge University Press, 2014) (Not yet published).

International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law, Eds. by Roberta Arnold and Noëlle Quénivet, (Martinus Nijhoff Publishers, 2008)

Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International law*, (Cambridge University Press, 2003).

The Handbook of International Humanitarian Law, Ed. by Dieter Fleck, (Oxford University Press, third edition).

Global and European Treaties, eds. by Ole Kristian Fauchald and Bård Sverre Tuseth, (Department of Public and International Law, University of Oslo, 2007).

ARTICLES

Marko Milanovic, 'Norm Conflict in International Law: Whiter Human Rights?', *Duke Journal of Comparative and International Law*, Vol 20:69:2009. Available at <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1054&context=djcil> (accessed 24.04.2014).

Alexander Orakhelashvili, 'The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?', *the European Journal of International Law* Vol. 19 no. 1 (2008). Available at <http://www.ejil.org/pdfs/19/1/178.pdf> (accessed 24.04.2014).

Michael N. Schmitt, 'Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance', *Virginia Journal of International Law*, (Vol. 50:4:2010). Available at

<https://www.usnwc.edu/getattachment/3c6d9d5d-71c9-45b4-b5ad-99526e06849e/Military-Necessity-VJIL-50-4-Schmitt-Essay.aspx> (accessed 24.04.2014).

Nobuo Hayashi, 'Do the Good Intentions of European Human Rights Law Really Pave the Road to IHL Hell for Civilian Detainees in Occupied Territory?', (Not yet published. Given to me by the author to be used discreetly).

REPORTS AND DOCUMENTS

Policy Brief 2007, 'From Legal Theory to Policy Tools: International Humanitarian Law and International Human Rights Law in the Occupied Palestinian Territory', (Harvard University). Available at <http://www.hpcrresearch.org/sites/default/files/publications/IHRLbrief.pdf> (accessed 24.04.2014).

International Committee of the Red Cross, 'Customary International Humanitarian Law: Volume 1 Rules', Jean-Marie Henckaerts and Louise Doswald-Beck, (Cambridge University Press, 2005). Available at <http://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf> (accessed 24.04.2014).

Report of the Study Group of the International Law Commission, finalized by Martti Koskeniemi, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', (A/CN.4/L.682), 13 April 2006. Available at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/CN.4/L.682 (accessed 24-04.2014).

Commentary to the ILC Draft Articles on Responsibility of States for International Wrongful Acts, Official Records of the General Assembly, Fifth-sixth Session (A/56/10). Available at <http://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf> (accessed 24.04.2014).

Security Council Resolution 1546(2004), (S/RES/1546).

Commission on Human Rights, (E/CN.4/1999/92).

Human Rights Committee General Comment No. 29, (CCPR/C/21/Rev.1/Add.11), 31 August 2011.

TABLE OF CASES

International Court of Justice

Reparations for Injuries suffered in the Service of the United Nations, (Advisory Opinion), ICJ Reports, April 11, 1949.

Reservations to the Convention on Genocide, (Advisory Opinion), ICJ Reports 1951, p. 15.

Application of the Convention of 1902 governing the Guardianship of Infants (Netherlands v. Sweden), Judgment of November 28th, 1958, ICJ Reports 1958, p. 5.

Legality of the Threat or Use of Nuclear Weapons, (Advisory Opinion), ICJ Reports 1996, p. 226.

Legal Consequences of the Construction of a Wall in the Occupied Territory, (Advisory Opinion), ICJ Report, 2004, p 136.

Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), (Judgment), ICJ Reports 2005, p. 168.

European Court of Human Rights

Ahmet Özkan and Others v. Turkey, (21689/93), Chamber, (Judgement), 6 April 2004

Al-Jedda v. the United Kingdom (27021/08) Grand Chamber (Judgement), 7 July 2011

Al-Saadoon and Mufdhi v. the United Kingdom

Al-Skeini v. the United Kingdom (55721/07), Grand Chamber, (Judgement), 7 July 2011

Bankovic and Others v. Belgium and Others (52207/99), Grand Chamber, (Admissibility Decision), 12 December 2001

Ergi v. Turkey (66/1997/859/1057), (Judgement), 28 July 1998

Güleç v. Turkey (54/1997/838/1044), (Judgement), 27 July 1998

Isayeva v. Russia (57950/00), Chamber, (Judgement), 24 February 2005

Issa and Others v. Turkey (31821/96), Grand Chamber, (Merits), 16 November 2004

Kononom v. Latvia (36376/04), Grand Chamber, (Judgement), 17 May 2010

Korbely v. Hungary (9174/02), Grand Chamber, (Judgement), 19 September 2008

Loizidou v. Turkey (40/1993/435/514), Grand Chamber, (Preliminary Objections) 23 March 1995

Loizidou v. Turkey (40/1993/435/514), Grand Chamber, (Merits), 28 November 1996

McCann and Others v. the United Kingdom, (18984/91), Grand Chamber, (Judgement), 27 September 1995

Medvedyev and Others v. France (3394/03), Grand Chamber, (Judgement), 10 July 2008

Nada v. Switzerland (10593/08), Grand Chamber, (Judgement), 12 September 2010

Tyrer v. United Kingdom (5856/72), Chamber, (Merits), 25 April 1978, Series A no. 26

Wemhoff v. Germany (2122/64), Chamber, (Judgment), 27 June 1968

Öcalan v. Turkey (46221/99), Grand Chamber, (Merits)

International Criminal tribunal for the Former Yugoslavia

Prosecutor v. Anto Furundzija, (Case No. IT-95-17/1), Trial Chamber II, (Judgment), 10 December 1998

National Court of the United Kingdom

Regina v. Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3), 24 March 1999, House of Lords

The Queen v. Secretary of State for Defence (on the application of Hilal Abdul-Razzaq Ali Al-Jedda), Judgment of 12 August 2005, Case No. CO/3673/2005

US Military Tribunal, Nuremberg

United States v. List (The Hostage Case), (Case No. 7), (Judgment), 19 February 1948

TABLE OF TREATIES

The Hague Regulations concerning the Laws and Customs of War on Land - 1907

Charter of the United Nations – 1945

Statute of the International Court of Justice - 1945

Universal Declaration of Human Rights – 1948

Convention on the Prevention and Punishment of the Crime of Genocide – 1948

First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field – 1949

Second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea – 1949

Third Geneva Convention relative to the Treatment of Prisoners of War – 1949

Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War – 1949

European Convention on Human Rights (ECHR) - 1950

International Convention on the Elimination of All Forms of Racial Discrimination (CERD) - 1966

International Covenant on Economic, Social, and Cultural Rights (ICESCR) - 1966

International Covenant on Civil and Political Rights (ICCPR) - 1966

Optional Protocol to the International Covenant on Civil and Political Rights - 1966

Vienna Convention on the Law of Treaties - 1969

American Convention on Human Rights (ACHR) - 1969

Additional Protocol I to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts – 1977

Additional Protocol II to the Geneva Conventions Relating to the Protection of Victims of Non-International Armed Conflicts – 1977

African Charter of Human and Peoples' Rights - 1981

United Nations Convention on the Law of the Sea - 1982

European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment - 1987

Convention on the Rights of the Child – *1989*

Draft Articles on Responsibility of States for International Wrongful Acts - *2001*

Arab Charter on Human Rights – *2004*

Additional Protocol III to the Geneva Conventions Relating to the Adoption of an Additional
Distinctive Emblem - *2005*